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NOTES.

CARRIERS—JURISDICTION—DUTY TO SUPPLY CARS—CHARACTER OF VEHICLES—"OIL TANK CAR CASES"— Since the decision of the Supreme Court of the United States in the Abilene Oil Company case,[1] it has been settled that a purely administrative question arising under the Act to Regulate Commerce is primarily and exclusively for the determination of the Interstate Commerce Commission. This has repeatedly been applied in cases involving questions as to the reasonableness of rates or as to whether they are discriminatory, and questions involving discrimination with reference to car distribution. On the question of car supply, Sec-

[1] Texas & Pacific R. Co. v. Abilene Cotton Oil Company, 204 U. S. 426 (1907).

tion One of the Act to Regulate Commerce as amended by the Hepburn Act of 1906, after defining "transportation" as including "cars and other vehicles and all instrumentalities, and facilities of shipment or carriage," says that "it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, . . ." Under this section questions at once arise as to the extent to which the enforcement of the obligation therein embodied calls for the determination of administrative questions.

That the jurisdiction of the Interstate Commerce Commission on the one hand, and of the courts on the other, depends upon whether the enforcement of this obligation requires the determination of an administrative or of a non-administrative question, was declared in the case of *Pennsylvania Railroad* v. *Puritan Coal Company*.[2] In that case, as in most of these cases, the railroad had a rule for allotting cars to the shippers. It was said that if this rule had been attacked as unreasonable or unjustly discriminatory, and if the action had thus involved scrutiny of the rule, an administrative question would have been presented over which the Commission would have had exclusive jurisdiction.[3] However, if the rule is admitted to be reasonable, but the complaint is directed against its unfair enforcement, or if the railroad has no rule for allotting cars, then no administrative question is involved and a claim for damages for failing, upon reasonable request, to furnish a shipper with a sufficient number of cars to satisfy his needs may be enforced in either a Federal or, by virtue of the provisions of Section Twenty-two of the Act,[4] in a state court, without any preliminary finding by the Interstate Commerce Commission; and this whether the carrier's default was a violation of its common-law duty existing prior to the Act, or of the duty prescribed by Section One of the Act as amended in 1906.[5]

[2] 237 U. S. 121 (1915). See discussion of this case in 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 787 (June, 1915).

[3] B. & O. R. R. v. Pitcairn Coal Co., 215 U. S. 481 (1910); I. C. C. v. Illinois Central R. R., 215 U. S. 452 (1910); Morrisdale Coal Co. v. P. R. R., 230 U. S. 304 (1913).

[4] Section 22 declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

[5] Eastern Railway Co. v. Littlefield, 237 U. S. 140 (1915); Illinois Central R. R. v. Mulberry Hill Coal Co., 238 U. S. 275 (1915); P. R. R. v. Clark Coal Co., 238 U. S. 456 (1915). In Vulcan Coal & Mining Co. v. Illinois Central R. R., 33 I. C. C. R. 52 (1915), decided several months before the Puritan Coal Company case, the Interstate Commerce Commission declared that the question as to the extent to which the railroad failed to comply with the duty it owed the complainants to furnish cars upon reasonable request therefor, was an administrative one of which the Commission alone can take original jurisdiction. This does not agree with the test of what is an administrative question as determined by the Puritan

In this connection two recent decisions of our highest tribunal are of importance. In *Pennsylvania Railroad* v. *Sonman Shaft Coal Company,*[6] a suit for damages was brought in a state court against a railroad for failure to furnish cars to a coal company. The conditions in the coal trade were normal and no question of discrimination was raised. Although the railroad had a rule for allotting cars which it had been following, no attack was made upon this rule. The Supreme Court of the United States held that the state court could entertain the action consistently with the Interstate Commerce Act, by reason of Section Twenty-two, which preserved the existing common-law remedies. No administrative question was involved, for, the conditions of the coal trade being normal, the duty of the carrier to have furnished the cars arose from the common law. Section One of the Act, as amended in 1906, was, for these purposes, regarded as merely adopting the common-law rule. In reply to the railroad's contention that the reasonableness of its rule of allotment was in issue and thus an administrative question presented for the Commission, the Court answered that where the conditions of trade are normal such a rule is unimportant, for the carrier's duty is measured by common law, that is, by the reasonable requests of the shipper based upon his actual needs. In the words of the Court: "It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs."

In the second case, known as the *Oil Tank Car Cases,*[7] decided just one week after the *Sonman Coal Company* case, the Commission had ordered the Pennsylvania Railroad to provide and furnish tank cars in sufficient number to transport the normal shipments of the complainant's oil. The Supreme Court of the United States held, that an order to provide such special cars was beyond the power of the Interstate Commerce Commission. Prior to 1906, the Commission had decided that the carrier's duty to provide and furnish equipment for the transportation of commodities might expand with time and conditions so that the special car would become the common car and the shipper's right to demand it would receive the sanction of the law. Thus cattle cars and refrigerator cars had, through the growth of trade, become

Coal Company case. The decision of the commissioners has been appealed from, and it has not yet been decided.

[6] 37 S. C. R. 46, decided December 4, 1916.

[7] United States and Interstate Commerce Commission v. The Pennsylvania Railroad; United States, Interstate Commerce Commission and Crew-Levick Company v. The Pennsylvania Railroad. Decided December 11, 1916. 37 S. C. R. 95.

so essential to the safe carriage of commodities, that they had received the sanction of the law, but it was the sanction of the common law and not of the Act to Regulate Commerce, and the remedy was in the courts and not in the Commission.[8] With this view of the carrier's obligation before the passage of the Hepburn Act of 1906, it remained for the Court to consider whether any change had been made by that Act. Section One of the original Act of 1887, had defined "transportation," as including all instrumentalities of shipment or carriage; the Amendment of 1906, as we have seen, defined it as including "cars and other vehicles and all instrumentalities and facilities of shipment or carriage." The Court held that there was no advance made or enlargement of meaning by the new definition, but it was simply a useless tautology. And also the addition to Section One of the words: ". . . it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor . . . ," were held not to bring the enforcement of this duty within the jurisdiction of the Commission. For there was no question of the carrier's duty to furnish the instrumentalities of transportation either under the Act of 1887, or under the Amendment of 1906, and it had already appeared that the Commission viewed the remedy as existing, under the former Act, solely in the courts. The words were, but the expression of a necessary implication, for, the duty having been imposed, it necessarily could be demanded.

Finally, it was argued that the Commission derived its power from Section Fifteen of the Amendment of 1910, which gave that body jurisdiction, among other things, over any regulations or practices which were unjust or unreasonable or unjustly discriminatory. Applying this section, it was contended that the neglect to provide or at least the refusal to furnish tank cars was a "practice." The Supreme Court refused to follow such a construction which, carried out to its logical conclusion would embrace every detail of railroad operation, their thought being that "if Congress had intended such a consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language, but would have put it in explicit declaration." There being, then, nothing which showed that the administrative power and remedy of the Commission under the Act of 1887, had been enlarged by the subsequent amendments, it followed that the order which they attempted to make was beyond their power.

What is the extent of the carrier's obligation to furnish equipment, in the light of these two recent decisions, both as to the num-

[8] *Re* Transportation, *etc.*, of Fruit, 10 I. C. C. 360 (1904); Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. 193 (1892); Scofield v. Lake Shore & Michigan Southern R. Co., 2 I. C. C. 90 (1888).

ber of cars, and as to the character of the vehicles? Regarding the number of cars, the extent of the obligation is summarized in the Sonman Coal Company case. In normal times the carrier's duty is measured by common law, that is by the reasonable requests of the shipper based upon his actual needs, and no administrative question is ordinarily involved. In such a situation, jurisdiction is not exclusively in the Interstate Commerce Commission, but can be exercised equally by the Federal or a state court. While in abnormal times, that is, in times of car shortage, the extent of the obligation to furnish cars is one of reasonableness which directly involves an administrative question and thus jurisdiction is exclusively in the Commission.[9] Regarding the character of vehicles, the Oil Tank Car cases hold that the extent of such obligation is measured entirely by common law and is enforceable at no time by the Commission, but solely by the courts. Whether the courts would compel the carrier to furnish special vehicles is another question depending, among other things, upon the conditions of trade and the business of the shipper.

P. H. R.

CONSTITUTIONAL LAW—DUE PROCESS CLAUSE—RESTRICTIONS ON USE OF LAND—An increasing community sense throws into sharp relief the extremely individualistic attitude of the common law. In the contemplation of the latter the right of the land-owner extends *usque ad caelum,* and, subject only to the limitation that he inflict no injury upon another, he may use his property for any purpose he sees fit. It is only when a nuisance is created that his neighbors may invoke the aid of the courts. But the term *nuisance* has become associated largely with smudgy chimneys, defective reservoirs and cess-pools. Against the erection of structures repugnant to the artistic sensibilities of the neighborhood, there seems to be no remedy.

It is not that esthetic considerations are above—or beneath the jurisdiction of the courts. A municipality, it is now well settled, may impose taxes for just such purposes; it may acquire land to be used for parks, libraries, art-galleries, convention halls . . . provided only that it compensates the owner.[1] The point upon which the law is less satisfactory is as to the right of a city to enjoin the property owner from a use of his property which cannot be technically termed a nuisance.[2]

The present attitude of the courts can be stated briefly.

[9] This is, of course, *dictum* by the court, based upon the words in the Puritan Coal Company case.

[1] Attorney-General v. Williams, 174 Mass. 476 (1899).

[2] Commonwealth v. Boston Advertising Co., 188 Mass. 348 (1905).